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HARMONIZATION OF ISLAMIC LAW AND CIVIL LAW: IS IT POSSIBLE?

The question has been answered

Looking at the title, I am tempted to give a one-sentence answer: **Yes, in fact it has been done.** But, certainly, I should not stop there otherwise I will disappoint you. So, I'll go on to give some examples to support the answer.

Examples:

- (1) Shariah Civil Procedure Act/Emancments - adapted from the Subordinate Courts Rules 1980, with modifications.
- (2) Shariah Criminal Procedure Act/Enactments - adapted from the Criminal procedure Code, with modifications.
- (3) Shariah Evidence Act/Enactments - adapted from the Evidence Act 1950, with modifications.
- (4) Islamic Family Law Act/Enactments.
- (5) Common law remedies introduced in the Shariah Courts e.g. injunction, attachment of salaries, seizure and sale etc.
- (6) Structure, name of Shariah Courts, follows the civil court.
- (7) Desingnation, dress, manner of addressing judges copied from civil court.
- (8) Islamic law principles introduced in federal law e.g. Islamic banking and takaful.

I have to make a point

Before going any further, I have to make a point. A few years ago, a student from the University of Istanbul came to interview me for his Phd. thesis. The first question he asked me was: "What is your definition of Islamic law?" I replied: "Any law that is not un-Islamic". After he had returned to Istanbul, he sent me an email. Among other things he said: "How I wish that our 'ulamas' are as broadminded as you are." I replied: "The point is I am not an 'ulama'".

That is the point I want to make. So, if I say something concerning Islamic law which is not quite right, please correct me.

Misconception

(1) That what are commonly called “Islamic law” are all God-made law and that there are no non-Prophet human opinions in them and that what are called “civil law” are all un-Islamic. That I think that is not quite right. If we look at the details and pay more attention to substance rather than form, we will find more similarities than differences. A study made in Pakistan some twenty years ago found that about 90% of the Pakistani laws, which was based on common law principles, are not contrary to Islamic law. David Moussa Pidcock, who wrote the introduction to the book Napoleon and Islam says that 97% of Code Napoleon was taken from the rulings of Imam Malik. I would think the position in Malaysia is similar to that is Pakistan. In fact, I think, even if we decide to implement Islamic law in full in Malaysia, at least 80% of the existing laws will remain. You can call it my guess.

(2) That so long as you implement what you call Islamic law, no matter how it is implemented, there will be justice. That again, in my view, is wrong. Any law, so long as it is administered by humans, if not administered fairly, honestly and efficiently, may lead to injustice. If the law in question is Islamic law, Islam gets the blame.

(3) That all that is found in the “fiqh” books are God-made law, fixed, unchanging and unchangeable. Again, I do not think it is absolutely correct. If it is so, how do you explain the existence of the various schools of thought? Isn’t there a difference between “shariah” and “fiqh”? We know that within about a decade from the death of the Prophet, Umar Ibn Al-Khattab changed certain practices of the Prophet which we accept as Islamic and authoritative. We also know that after having lived in Egypt for a few years, Imam Shafi’e revised his earlier views. We live 1400 years away.

(4) That to implement Islamic law you have to return to the old days, centuries ago, do what they did, the way they did, no others and not differently. That, in my view, is unrealistic. The reality of today must be taken into account.

(5) The focus is more on punishment, not on Islamic law as a whole and justice.

Realities

(1) We live in a different world now. Many things that did not exist during the life time of those traditional “fiqh” scholars, exist now. Many things are now done differently from their time. Trading, for example, is no longer confined to direct selling where the seller, the buyer and the goods are present. On the other hand we now have insurance coverage, grading, standardization, warehousing

etc. – see Prof. Hashim Kamali's Islamic Commercial Law. Today, people borrow not just to buy basic necessities. In fact, richer people borrow more than poor people. No big business is financed by personal savings. You will never save enough to have the kind of capital needed. You have to borrow and a lot. We need more laws now than was required at their time. Many such laws were unimaginable during their time, e.g. cyber law, telecommunication law, electricity law, road traffic law, environmental law etc.

(2) The development of Islamic law had not kept up with the development in other fields, e.g. science, technology, international commerce, finance, banking etc.

(3) I do not think there is any model from any "Muslim" country for us to follow. Quite often we look at Sudan, Nigeria, Pakistan and Saudi Arabia. But, have they produced a system that is worth following? Nigeria introduced "hudud". But, if you follow the development of the case of Saffiyatu Hussaini and Yakubu Abubakar, you see signs of back-tracking. The Shariah Appellate Bench of the Supreme Court of Pakistan came up with a very historic judgment on "riba". That judgment has been set aside by the Supreme Court of Pakistan. I do not say whether the earlier or the later judgments in the two cases are right or wrong. I mention them merely to show the difficulties faced by them. In fact I was told that, after the judgment by the Shariah Appellate Bench, Pakistani officers came over to Malaysia to learn how we do things. In the affidavits filed in the application to set aside the judgment of the Shariah Appellate Bench, it was stated that the implementation of the judgment was neither practical nor feasible and would pose a high degree of risk to the economic stability and security of Pakistan. It was also said that the "parallel approach" would be the best in the interest of the country. That "parallel approach" is no other than the Malaysian approach as in the case of Islamic banking and "takaful". So, we are the model.

(5) The details of Islamic law are still in text books, with opinions varying on similar issues. Whether we like it or not, under the present system, to implement a law, it has to be codified. The law has to be certain, so that lawyers know what the law is to enable them to advise clients and the courts know which law to apply.

(6) In Malaysia, shari'ah courts are state courts with jurisdiction within the state and over Muslims only. Their jurisdictions are limited to matters stated in List II of Ninth Schedule of the Constitution. Matters in List I are matters within federal jurisdiction. State legislatures cannot make laws over matters stated in Federal List and vice versa. It is mutually exclusive. There can be no parallel federal and state laws, even if one is for Muslims and the other for non-Muslims, unless specifically provided for e.g. personal law. Please do not get confused. Islamic banking and "takaful" laws are federal laws under "banking" and "insurance" which are matters in the Federal List.

Harmonization the only way

In the circumstances that we are in today, the only way to implement Islamic law is through harmonization with existing law (“civil law”). Merely abolishing the existing laws and declaring that it is replaced by “shari’ah” is not going to work. Ja’afar Nameiri did that in Sudan, for political reasons, and ended in a mess. The Talibans did that in Afghanistan and ended persecuting men without beard and women who do not wear the “burkha”. Zia Ul-Haq is supposed to have introduced “shari’ah” in Pakistan, again mainly, I believe, for political reasons. I do not know how well it is working. But from the “riba” case that I have mentioned and the “zina” cases that we have read, they seem to have serious problems too.

To what extent the two laws can be harmonized I do not know. It depends partly on our approach. If you want all or nothing and if you want to reset the clock 1400 years backward, I think, you will not get anywhere. But, if you are prepared to take stock of the present reality, approach the subject of Islamic law with a more open mind and apply the principles that are more readily acceptable and are applicable first and move step by step, I think you will get somewhere.

The approach:

If we want to sell our goods, we will have to promote them in the way that will attract the customers, without compromising the quality and character of our goods. You do not sell anything by condemning potential customers. We have to be pragmatic, not dogmatic.

(1) We have to work within the confines of the Constitution.

(2) We have to work on existing laws and make them Islamic. We need a basis to work on. Identify which parts of the existing laws are un-Islamic. Look for the principles of Islamic law, not so much the way something was done centuries ago, and apply them in the present context. That was how those laws that I have mentioned at the beginning of my speech were done.

(3) We should concentrate on laws that are easily acceptable by the public first. Choose those areas that can be clearly seen by the public to be more just or more beneficial to them than the civil law. An example is the common law principle of “caveat emptore”, which, to my mind, protects dishonest seller more than honest buyers. As I understand it, the Islamic principle insists equal honesty on the part of the seller and the buyer. There is even a duty on the part of the seller to disclose the defects in the goods offered for sale.

(4) Priority should be to infuse Islamic law principles into federal laws applicable to all, Muslims and non-Muslims, as has been done in the case of Islamic banking and takaful. “Mu’amalat” is a good starting point. If it can be shown to me more beneficial to them, the public, even the non-Muslims, will prefer their transactions to be governed by it. Why do you think that the non-Muslim businessmen go for Islamic banking? It is not because of “iman” or to avoid committing a sin. It is simply because it is more profitable to them: they do not have to pay interest, compound interest, penalty interest and interest upon judgment. So, the longer they delay the repayment, the more they profit. To them profit is “ma’aruf”, loss is “munkar”. It is as simple as that. In fact, we are the ones who should not be naïve and be taken for a ride. Normally, we are. We are so concerned with ideals and form that we do not see the loopholes.

Who is going to do it?

That is the real problem. Strictly speaking, “those who allege should prove.”

But, the problem is, those who know Islamic law, more often than not, do not know civil law. Those who know civil law, more often than not, do not know Islamic law. Pakistan faced that problem. See Islamization of Pakistani Law by Dr. Tanzil-Ul-Rahman (1978). I would add: more often than not, those know something of both have never practised law. Those who are most vocal and loud do nothing positive, they speak in general terms and condemn others.

If we want to have more, we have to produce more. Stop wasting time on rhetoric. The “shari’ah” experts, the civil law experts and practising lawyers should work together, in groups. Each should concentrate in one particular area. Identify the existing laws that are un-Islamic and come up with the proposed laws which they believe are Islamic.

That I think is the only way to do it.

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